UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

NOV 3 - 1983

Certified Mail:RRR:P273791215

Harvey Rosenzweig, Esquire
Law Department
Borden Inc.
180 East Broad Street
Columbus, Ohio 43215

LAD980749899

Re: Determination of Confidentiality Claims

Dear Mr. Rosenzweig:

Enclosed is our "Determination of Business Confidentiality" for the twelve notifications of hazardous waste sites which Borden Inc. submitted to EPA Region 6 in accordance with §103(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq.

This "Determination" constitutes final agency action with respect to those claims, as indicated herein, in accordance with 40 C.F.R. §2.205(f).

Sincerely,

Paul Seals
Regional Counsel (6ORC)

Enclosure a/s

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

In Re:

TWELVE CLAIMS
(Borden Inc.)

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Regional Counsel's
Determination of
Business Confidentiality
(40 C.F.R. Part 2)

DATE: NOV3 - 1983

BACKGROUND

In accordance with Section 103(c) of the Comprehensive Environmental Response Compensation & Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq at §9603(c), and regulatory notices promulgated thereunder, industries have submitted "Notifications of Hazardous Waste Site," EPA Forms 8900-1 or equivalent, to the Region VI Administrator of the United States Environmental Protection Agency (EPA). Generally, the CERCLA notifications contain information on the location and type of former hazardous waste sites, together with the types of waste which each site had received. In accordance with EPA's widely distributed April 1981 notice, published at 46 Fed. Reg. 22153, those chemical companies who had responded to a 1979 U.S. House Committee (hereinafter, "Echardt format" notifiers) "may choose to --complete Form 8900-1 or --submit to EPA the information provided to the House Committee, updating and supplementing it as necessary to provide the information requested in Form 3900-1."

Although the information in the CERCLA notification forms

is generally innocuous, there may be situations in which its public disclosure could reveal trade secrets, proprietary processes, or other privileged business information. Accordingly, EPA provided persons submitting such notifications (hereinafter, "notifiers") with an opportunity to submit claims of business confidentiality for information in the notifications. Potential CERCLA notifiers were notified, both in the CERCLA notification forms and at 46 Fed. Reg. 22144ff (April 15, 1981) that claims of confidentiality e.g., "trade secrets," must be identified on the submittals. Full substantiation of such claims could be submitted at the time of notification submittal or within fifteen (15) working days of later EPA requests.

EPA regulations at 40 C.F.R. Part 2, Subpart B provide guidelines for determining whether information is entitled to confidential treatment under both the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Trade Secrets Act, 28 U.S.C. §1905. In order to establish a legitimate claim of business confidentiality or trade secrecy, the claimant bears the burden of demonstrating, inter alia, that disclosure of the information is likely to cause substantial harm to its competitive position. 40 C.F.R. §2.208(e)(1). See also National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir., 1974). (Note, the alternative test set forth in National Parks, i.e., that disclosure would be likely to impair the government's ability to obtain similar information in the future, is inapplicable to information, like that involved here, which has been submitted pursuant to statutory requirement. See 40 C.F.R. §§2.208(e)(2),

2.201(i); Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 51 (D.C. Cir., 1981).) Moreover, specific factual or evidentiary material is required to support a claim of business confidentiality. Conclusory or generalized allegations are insufficient. See, e.g., Pacific Architects and Eng'rs Inc. v. Renegotiation Board, 505 F.2d 383 (D.C. Cir., 1974); Public Citizen Health Research Group v. F.D.A., 704 F.2d 1280 (D.C. Cir., 1983). Of course, in any later attempt to withhold the information as allegedly confidential, a federal agency would have the burden of clearly demonstrating the applicability of particular exemptions to disclosure, as in, e.g., E.P.A. v. Mink, 410 U.S. 73, at 93 (1973), Anchorage Bldg Trades Council v. D.H.U.D., 384 F.Supp. 1236 (D.Ak., 1974) and Mobil Oil Corp. v. F.T.C., 406 F.Supp. 305 (S.D.N.Y., 1976), a burden which can hardly be borne if the initial applicant, upon notice and opportunity for comment, has failed to substantiate its request.

BORDEN NOTIFICATIONS (Louisiana)

EPA Region 6 provided notice to Borden Inc. and its Borden Chemical Co. (hereinafter, Borden or notifier) on July 28, 1983 in accordance with 40 C.F.R. §2.205(e) that the regional office was actively reviewing Borden's claim of confidentiality on seven (7) CERCLA notifications, submitted during 1981 in "Echardt format," for hazardous waste sites in Louisiana, corresponding to the following EPA Region 6 "Superfund" notification reference numbers (noting also number of pages received, EPA's more recent hazardous waste site or 'Hazsit'

file number, and site name associated):

-LAS000001132 (6p)(LA03026)(Monochem Landfill)
-LAS000001133 (6p)(LA03018)(Ascension Landfill)
-LAS000001134 (4p)(LA00507)(Four-Way Hauling)
-LAS000001193 (4p)(LA00345)(Petro Processing)
-LAS000001194 (4p)(LA00396)(C.L.A.W.)
-LAS000001195 (4p)(LA00397)(Rollins)
-LAS000001196 (4p)(LA00639)(Petrochemical)

Borden received the EPA notice by certified mail on August 1st, and provided no reply nor request for extension of time to EPA by August 22nd, 1983. 40 C.F.R. §2.205(d)(1).

A one-page reply from Borden counsel dated August 24th (received by EPA on August 29th) offered no specific or factual substantiation for the 1981 claim of confidentiality, suggesting only that since the 1981 CERCLA notifications were in the "same form as previously submitted" to a House Committee in 1979, then "therefore, we believe that the [congressional] confidentiality provisions continue to apply."

Borden's expressed belief amounts to only a vague claim of confidentiality by "penumbra," unknown in law, asking EPA to withhold the submitted marterials indefinitely from any FOIA requestors simply because Borden had originally prepared its site information under other (1979) assurances of confidentiality, and had then exercised its choice to submit its subsequent (1981) required CERCLA notifications in the same format. Borden's "belief" is not consistent with FOIA, the CERCLA of 1980, nor the Federal Register notice of April 15, 1981 which provided specifically that any claims of confidentiality would be governed by FOIA and EPA's FOIA regulations at 40 C.F.R Part 2, Subpart B. 46 Fed. Reg. 22144 at 22149 and 22152.

When notified by an EPA staff attorney (EPA letter of September 1st) that "confidentiality by penumbra" did not appear to present a substantive FOIA response, Borden's counsel replied (Borden letter of September 7th) that if EPA were to require a "demonstration that disclosure of the constituents listed on the 'Echardt form' would reveal the formulation of a product or other trade secret," then "Borden does not believe that it can submit information which would be sufficient to meet your requirements." EPA staff provided further clarification (letter of September 12) but received no further response from Borden.

The original basis of confidentiality claimed by Borden in 1981 was simply a "rubber stamp" claim of privilege, in which each page of the CERCLA notifications contains the "rubber stamp" marking: "Confidential / Attorney Work Papers Prepared For And At Request Of Counsel." However, the attorney-client privilege under "Exemption 5" of FOIA extends only to

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other other than an agency in litigation with the agency. 5 U.S.C. §552(b)(5).

"Exemption 5" of FOIA is focused on agency pre-decisional issues and intergovermnental memos, and does not extend to materials like these submitted by private parties under statutory requirement. Cf. E.P.A. v. Mink, above; N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Since the information in question is clearly not "inter-agency or intra-agency," the attorney-client privilege asserted initially by Borden would apparently apply only to a single element of "Exemption 4" of FOIA, as

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. §552(b)(4). Emp. added.

However, Borden has not provided any detail on the extent of information considered privileged, nor any demonstration of the elements of that privilege to support its bald claim. EPA cannot accept an unsupported claim of attorney-client privilege, just as courts have long recognized that the privilege (a) must be narrowly construed, (b) does not embrace everything arising from such a relationship, and (c) does not apply to information intended to be imparted to others or revealed to third parties. See cases cited in United States v. Pipkin, 528 F.2d 559 at 562-63 (5th Cir., 1976), cert. denied, 426 U.S. 952 (1976). Further, it is settled law that the privilege can only be sustained upon a demonstration of its several elements by the party claiming the privilege. Cf. United States v. United Shoe Mach. Corp., 89 F.Supp. 357 (D.Mass., 1950); United States v. Kelly, 569 F.2d 928 (5th Cir., 1978). Therefore, even this single element of an "Exemption 4" claim has not been demonstrated.

Borden has made no attempt to demonstrate the elements of any statutory "exemption" from public disclosure under FOIA, and its unsubstantiated claims of confidentiality must therefore be denied in accordance with 40 C.F.R. §2.205(f).

BORDEN NOTIFICATIONS (Texas & Mexico)

EPA Region 6 provided notice to Borden Inc. (Borden) by letter of August 28, 1983 in accordance with 40 C.F.R. §2.205(e) that the regional office was actively reviewing Borden's

claim of confidentiality on five (5) CERCLA notifications, submitted during 1981 in "Echardt format," for hazardous waste sites in Texas (4) and the Republic of Mexico (1), corresponding to the following EPA Region 6 "Superfund" notification reference numbers assigned in 1981 (noting also the number of pages received, EPA's more recent hazardous waste site or 'Hazsit' file number, and site name associated):

-TXSOC0001501 (5p)(TX00175)(Bio-Ecology)
-TX3000001503 (5p)(TX01791)(Angelina County Landfill)
-TXS000001682 (5p)(TX00949)(Diboll City Dump)
-TXS000001683 (5p)(TX00957)(Diboll Plant Dump)
-(unnumbered) (6p) (N/A) ("Minera Rosicler" Mexico)

EPA's notice letter was received by Borden on August 30, 1983 and acknowledged in a thirteen-line letter dated September 7, received by EPA on September 9, 1983. As noted previously, Borden's counsel noted that "Borden does not believe that it can submit information which would be sufficient...."

I regard Borden's terse reply as both an apparent waiver of confidentiality claims, 40 C.F.R. §2.205(d)(1), in that Borden submitted no substantive or responsive comments by September 20, 1983, and also a failure by Borden to carry its burden of proof with respect to substantiating the claims of confidentiality, 40 C.F.R. §2.208(e), which requires me to issue this denial of the claims in accordance with 40 C.F.R. §2.205(f).

Additionally, by letter of October 5, 1983 (to EPA Region 6, Superfund Branch, in response to a separate inquiry) Borden counsel provided information, without any claims of confidentiality, on the specific quantities of solvents and combustibles which were transported in 1973-76 from Borden's

Arlington, Texas plant to the Bio-Ecology Systems Disposal Site [Hazsit No. TX00175], subject of Borden's notification TXS000001501 above. This is an indicator that Borden has waived its prior claims of confidentiality for the 1981 CERCLA notifications, and, on one submittal, an action which makes much of the information "reasonably obtainable" without further consent of submitter, piercing the earlier claim. 40 C.F.R. §2.208(b)&(c).

DETERMINATION

Borden Inc. submitted business confidentiality claims with its 1981 CERCLA notifications, as identified above. However, following formal notice of EPA's substantive review of the claims, it has failed to submit any factual or evidentiary materials to demonstrate substantial harm to its competitive position. Instead, it has advanced only conclusory contentions which are of no value in examining claims of confidentiality, relying upon mere ipse dixit argument to support its "rubber stamp" claims. Because Borden Inc. as notifier/submitter has not sustained its burden of proof, I deny its claims of business confidentiality in accordance with 40 C.F.R. §2.205(f). Further, since Borden Inc. did not reply (in the second group, did not reply substantively) within fifteen business days, I also determine that the subject confidentiality claims have been waived. 40 C.F.R. §2.205(d)(1).

This formal determination constitutes a notice of denial, pursuant to 40 C.F.R. §2.205(f), of the business confidential-

ity claims asserted by the notifier (Borden Inc.) in its 1981 CERCLA notifications identified above. It constitutes a final agency action with respect to those claims and is subject to judicial review under Chapter 7 of Title 5, United States Code. Subject to the provisions of 40 C.F.R. §2.210, EPA will make the above information claimed confidential by the notifier available to the public on the tenth working day after notifier's receipt of this determination unless the Office of Regional Counsel, EPA Region 6, has been notified that the notifier has commenced an action in a federal court to obtain judicial review of this determination. If such an action is timely commenced, EPA may nonetheless make the information available to the public, in the absence of an order by the court to the contrary, once the court has denied a motion for preliminary injunction in the action or whenever it appears to the Office of Regional Counsel, after reasonable notice to the notifier, that the notifier is not taking appropriate measures to obtain a speedy resolution of the action.

PAUL SEALS
Regional Counsel